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In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

HOME BOX OFFICE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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HOME BOX OFFICE, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Communications Commission petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A,[1] pp. 1–116) and the special concurring opinion of Judge MacKinnon (App. B, pp. 117–122) have not yet been reported. The orders of the Federal Communications Commission (Apps. C–F, pp. 123–242) are reported at 52 FCC 2d 1, 54 FCC 2d 797, 35 Rad. Reg. (P&F) 2d 767, and 51 FCC 2d 317.

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[1] The appendices to this petition are set forth under separate cover.

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JURISDICTION

The judgment of the court of appeals was entered on March 25, 1977 (App. G. pp. 243–246). A partial stay of mandate was granted by the court of appeals on May 4, 1977 (App. H, pp. 247–250), and this petition for certiorari is being filed within the time allowed by the court. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether it is within the Commission's statutory authority and constitutionally permissible under the First Amendment for the Federal Communications Commission to adopt rules applying the same requirements already governing subscription broadcasting to subscription cablecasting which is voluntarily undertaken by cable systems also carrying broadcast signals.

(2) Whether the requirement of the court of appeals concerning the evidentiary support required for rules necessarily looking to future events constituted an improper application of the standard of review for informal policymaking proceedings in derogation of the Commission's broad discretion to plan in advance of reasonably foreseeable events.

(3) Whether the action of the court of appeals barring all *ex parte* communications in informal rulemaking proceedings unjustifiably infringes upon the distinction between rulemaking and adjudication which is fundamental to modern administrative law.

STATUTES INVOLVED

Sections 1, 2(a), 3(a), 3(b), 307(b) and 326 of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. §§ 151, 152(a), 153(b), 307(b), and 326, are set forth in App. I, pp. 251–252.

STATEMENT

This petition seeks review of an opinion (App. A, pp. 1–116) and judgment (App. G, pp. 243–246) setting aside various regulations of the Federal Communications Commission which were designed to prevent the siphoning to pay cable television of certain sports events heretofore broadcast over conventional free television and to promote the development of pay cable as a beneficial supplement to over-the-air television.[2]

The Commission has long been concerned that popular television programs not be lost to the general viewing audience as a result of being siphoned away from free television to pay services available to only a minority. After a seventeen-year inquiry into subscrip-

[2] As used herein, pay cable or subscription cablecasting is the service whereby non-broadcast programming is distributed over cable television systems whose channels are also used to carry broadcast programming, and subscribers are charged an additional program or channel fee beyond the regular monthly fee for the system's broadcast signal carriage service. *First Repart and Order in Dockets 19554 and 18893*, 52 FCC 2d 1, 2 (1974) (App. C, p. 124).

tion television (STV),[3] in which it became apparent that sports events and feature films were in greatest demand among pay subscribers, the Commission, in December 1968, adopted rules restricting the sports events and feature films which STV stations could broadcast in order to prevent siphoning and encourage the development of a service "with a type of programming generally not found in free television." *Fourth Report and Order on Subscription Television,* 15 FCC 2d 466, 556 (1968).

In addition to regulating when a particular sports event or feature film could be shown on STV, the Commission's rules provided that no series type program with interconnected plots or substantially the same cast of principal characters could be shown, that no advertising would be permitted during subscription operations (except for announcements to promote STV programs), and that no more than ninety percent of the total STV broadcasting hours could consist of sports events and feature films combined. 15 FCC 2d at 556–565, 597–598. The Commission's power to authorize STV stations on a permanent basis[4] and the restrictions on STV operations were affirmed in *National Association of Theatre Owners* v. *FCC,* 420 F.2d 194 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 922 (1970) (hereinafter *NATO*).

[3] Subscription television is the service whereby programs are transmitted in scrambled form and can be received in intelligible form by the use of decoders for which subscribers are charged a fee (App. C, p. 124).

[4] A trial STV operation had earlier been affirmed in *Connecticut Committee Against Pay TV* v. *FCC*, 301 F.2d 835 (D.C. Cir.), *cert. denied*, 371 U.S. 816 (1962).

When the Commission first considered whether it needed to regulate the origination of programming over cable systems (as contrasted with retransmission of broadcast signals), it did not focus upon the fact that such services could be accompanied by per-program or per-channel charges. Instead, in adopting a mandatory program origination rule for rule cable systems, the Commission considered and rejected the broader argument that unrestricted program origination over cable channels threatened to produce a siphoning of popular programming away from the broadcast service. *First Report and Order in Docket 18397,* 20 FCC 2d 201, 202–205 (1969). Upon reconsideration, the Commission did direct its attention to pay cablecasting, as distinguished from cablecasting unaccompanied by per-program or per-channel charges, and concluded that pay cablecasting posed the same threat presented by STV, of siphoning programs away from free television in favor of a service limited to those who can pay. In the case of pay cablecasting, unlike STV, there was the additional fact of cable's geographical unavailability in many places, particularly rural areas. Therefore, no distinction between pay cable and STV for purposes of the Commission's basic anti-siphoning policy could be justified, and the anti-siphoning rules already approved for STV were extended to pay cable services over systems which also carried broadcast signals. *Memorandum Opinion and Order in Docket 18397,* 23 FCC 2d 825, 828 (1970) (footnote omitted). This Court upheld the mandatory origination rules without passing upon the anti-

siphoning rules. *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 657 and n.14 (1972).

The instant rulemaking proceeding was initiated in 1972 to consider changes in the anti-siphoning rules. The Commission saw the central issue as "how pay cablecasting can best be regulated to provide a beneficial supplement to over-the-air broadcasting without at the same time undermining the continued operation of that free television service." *Notice of Proposed Rulemaking and Memorandum Opinion and Order in Docket 19554,* 35 FCC 2d 893, 898 (1972).

After nearly three years and the submission of numerous comments and two rounds of oral arguments, the Commission affirmed the determination made in 1970 that it could not permit pay cable to operate unregulated until siphoning began to occur. Instead it opted for taking "preventative measures . . . to avert the potential ill effects of siphoning before they are actually felt," and "when [regulatory action] involves no disruption of existing patterns" (App. C., p. 171). *See* also 23 FCC 2d at 828. Therefore, it continued the basic regulatory approach in effect for STV since 1969 and for pay cable since 1970, whereby the goal was to strike a balance between the objectives of developing pay cable and STV to fulfill their promise of greater viewing diversity, while at the same time avoiding impairment to the general public's interest in continuing to receive popular programs over free television (App. C, pp. 166, 191, 192).

Operating under these guidelines, the Commission determined that some modification of the sports anti-siphoning rules was consistent with the public interest.[5] Previously under the sports rules pay entrepreneurs were not permitted to exhibit games of a sporting event where a "substantial number" of games had been telecast without charge to viewers during specified time periods.[6] 15 FCC 2d at 562, 23 FCC 2d at 828. The Commission revised the rules to limit pay telecasts of specific sports events (such as the baseball World Series or the football Super Bowl) to those which had not been telecast live over free television in the relevant market during any one of the five preceding seasons.[7] With regard to non-specific sports events (such as regular season baseball or football games), the rules were relaxed so as to permit the

[5] This was also the case with the provisions concerning the feature films which could be shown over pay cable. Because the Commission is not arguing before this Court for the retention of the feature film siphoning rules as modified, the discussion above will be confined to the details of the modified sports rules.

[6] The formula for ending the uncertainty brought about by the use of the undefined "substantial number" concept and determining how many non-specific sports events for a given sport in a given year may be shown over pay cable and STV is set forth at App. C, pp. 182, 187, 192, 193–194.

[7] The original anti-siphoning rule for both STV and pay cable allowed pay exhibition of sports events which had not been televised over free television consecutively for the two immediately prior years. The five year rule adopted for pay cable in the instant proceeding had already been adopted for STV in 1972. *Report and Order in Docket 18893*, 34 FCC 2d 271 (1972).

televising of these events during a season on both a free and a pay basis (App. C, pp. 182–187).

The rules limiting pay operations to no more than 90% of their pay offerings to feature films and sports and restricting commercial advertising on pay programs were continued without change. These restrictions were an effective means, the Commission believed, of encouraging pay cable and STV to offer diverse and innovative programming, different from that found on the advertiser supported conventional television medium [8] (App. C, p. 188).

Several parties sought appellate review pursuant to 47 U.S.C. § 402(a). The court of appeals upheld the rules as they apply to subscription television,[9] but set them aside insofar as they govern subscription cablecasting.[10] The court found the pay cable rules to be unlawful on essentially three grounds: (1) the Commission exceeded its jurisdiction in promulgating the pay cable rules because the ends to be achieved were not "long established" in the field of broadcasting, and there is insufficient evidence in the record to support the need for regulation; (2) the rules violate the First Amendment because they restrict free speech

[8] The old rules prohibiting pay cable and STV from showing series-type programming were initially modified and later deleted altogether (App. C, pp. 187–188; App. E, pp. 225–227).

[9] This approval is subject to further review upon completion of additional hearings ordered by the court regarding *ex parte* contacts, discussed further *infra*.

[10] The Commission is herein asking this Court to review all aspects of the court's action setting aside the pay cable rules, except that review is not being sought of the action with respect to subsection (a) of the rules (App. C, pp. 192–193).

unnecessarily since cable is not limited by a scarcity of spectrum space like broadcasting and, moreover, the restraints appear greater than necessary to further any legitimate government interest; and (3) the informal rulemaking procedures utilized to adopt the rules violated fundamental notions of fairness and due process, and precluded court access to the "full administrative record" necessary for judicial review by permitting frequent *ex parte* contacts during the pendency of the rulemaking proceeding.

REASONS FOR GRANTING THE WRIT

The Communications Act of 1934, as amended, charges the Commission "to make available so far as possible, to all the people of the United States a rapid, efficient, Nationwide . . . wire and radio communication service." 47 U.S.C. 151. Achievement of this goal with respect to television communications is substantially impaired by the court's holding that the Commission has no jurisdiction to integrate pay cable into a total television system by requiring that it restrict its service to that which will supplement the service provided by conventional broadcasting. In view of cable television's burgeoning growth and the fact that much of the country has no alternative to conventional television, this restriction on the Commission's authority presents questions of far-reaching legal and practical importance. Closely related to this question is the decision by the court below that the pay cable rules constitute an unlawful restriction on free speech. This holding has created a conflict among circuits concerning the status of cable television systems which

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use broadcast signals under the First Amendment. This Court should resolve this conflict in order to remove further uncertainty concerning the Commission's constitutional as well as its statutory authority.

The decision of the court also raises important issues as to the proper application of the standard of review for informal rulemaking proceedings, and the ability of regulatory agencies to plan in advance of foreseeable events and to act on the basis of their own forecasts and expert judgments even where there is no concrete supporting evidence. In addition, the court's ruling prohibiting the Commission from receiving any *ex parte* contacts during the pendency of an informal rulemaking proceeding erroneously strikes down procedures heretofore considered permissible under the Administrative Procedure Act. This, together with the manner in which the court has applied the standard of review to this rulemaking, severely limits the utility of informal rulemaking proceedings as a device for formulating broad policy judgments. Such a consequence should not be permitted to occur without benefit of this Court's consideration.

I. THE COURT'S HOLDING THAT THE COMMISSION LACKS AUTHORITY TO REGULATE SUBSCRIPTION CABLECASTERS IN THE SAME MANNER AS IT REGULATES SUBSCRIPTION BROADCASTERS IS INCONSISTENT WITH PRIOR SUPREME COURT DECISIONS

This Court has twice had occasion to review the scope of the Commission's authority over cable television operations. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States* v. *Midwest Video Corp., supra.* As a result it has been established that the Commission has authority "to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting."[11]

The court does not dispute the fact that the Commission has authority to regulate cablecasting, but holds that the Commission lacks jurisdiction to adopt the subscription cablecasting rules here at issue because they do not appear designed to "further the achievement of long-established regulatory goals in the field of television broadcasting."[12] (App. A, p. 40, quoting *Midwest Video,* 406 U.S. at 667–668). The Commission stated its purpose to be "to insure that programs now provided over conventional television are not siphoned away to subscription television,"

[11] *Midwest Video, supra,* 406 U.S. at 667. That the Commission has authority over such cablecasting cannot be questioned. The *Midwest* plurality held specifically that "[t]he devotion of CATV systems to broadcast transmission—together with the interdependencies between that service and cablecasts, and the necessity for unified regulation—plainly suffices to bring cablecasts within the Commission's § 2(a) jurisdiction." *Id.* at 662–63 and n. 21. Even the dissenting justices did not dispute the Commission's authority to "regulate origination of programs;" their disagreement concerned whether this authority included the power "to compel cable systems to originate programs." *Id.* at 680 (dissenting opinion).

[12] It would appear that the "long established goal" test is an unduly restrictive statement of those permissible purposes which can satisfy the "reasonable ancillary" standard. *Southwestern Cable,* 392 U.S. at 178; *Midwest Video,* 406 U.S. at 664. However, it makes little difference at this juncture since the goals of the subscription cablecasting rules satisfy both tests.

(App. C, p. 163), in the belief "that the existing conventional television structure performs a valuable service to the public and that our statutory mandate to act in the public interest requires that we strive to maintain the public's ability to receive the informational and entertainment programming now provided by conventional television at no direct cost." (App. C, p. 165). The court's conclusion that this is not a legitimate goal under the Communications Act is erroneous and inconsistent with the holdings in *Southwestern Cable* and *Midwest Video.*

The Commission's responsibilities include the regulation of cable as necessary to the effective performance of its primary responsibility for maintaining a *nationwide system* of television broadcasting.[13] The Supreme Court's definition of that responsibility has been stated in comprehensive terms:

> The Commission has been charged with broad responsibilities for the orderly development of an appropriate system of local television broadcasting. The significance of its efforts can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population.[14]

[13] In *Midwest Video*, it was noted that the Commission's "express purpose" in regulating cable television was "to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the Act)." 406 U.S. at 665–666, quoting *Second Report and Order*, 2 FCC 2d 725, 745–746 (1966).

[14] *Southwestern Cable*, 392 U.S. at 165.

The Commission's "various responsibilities for the regulation of television broadcasting . . . are considerably more numerous than simply assuring that broadcasting stations operating in the public interest do not go out of business." 406 U.S. at 664. Most pertinent, here, they include the obligation to assure that viewers are provided suitably diversified programming. *National Broadcasting Co.* v. *United States,* 3190. S. 190 (1943); *Midwest Video, supra,* 406 U.S. at 669. Thus, the Commission may concern itself about the "content of the programming offered" over cable, and if it is not satisfied that cable operations continued to broadcast retransmission will provide sufficient diversity it may require cable operators to originate programming. *Midwest Video, supra.*

Another long established goal has been "the preservation of conventional television service and the continued availability of good program material to the free service," [15] primarily because the conventional service is relied upon by so many people for information and entertainment. This goal received recognition and approval in *NATO, supra,* 420 F.2d at 197, where the

[15] *Further Notice of Proposed Rulemaking and Notice of Inquiry in Docket 11279*, 31 F.R. 5 36, 7 RAD. Reg. (P & F) 2d 1501, para. 16 (1966). The Commission's recent *Memorandum Opinion and Order*, 60 FCC 2d 858 (1967), "Changes in the Entertainment Formats of Broadcast Stations," is not relevant here. As the Court recognized (App. A, p. 48), there the Commission stated that it has no authority to dictate entertainment formats. This is quite different from the situation here which, instead of dictating a total format to be broadcast, involves regulations to facilitate the abiilty of the free broadcasting service to continue offering, if it so chooses, popular entertainment programming.

court approved subscription television rules designed to avoid the "possibility that programs, audiences, and talent would be diverted ('siphoned') from free television to STV," because the Commission felt that the public's "tremendous investment . . . in television receivers based on the expectation of free service ought to be protected and the millions of viewers who rely on that free service for free entertainment should be permitted to do so." Clearly, regulations adopted to achieve this objective "preserv[e] and enhanc[e] the integrity of broadcast signals and therefore [are] reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Midwest Video,* 406 U.S. at 470. The rules here at issue for pay cable, which parallel the pay broadcasting rules initially upheld in *NATO,* clearly fall within this category, and therefore do not exceed the Commission's authority.[16]

[16] The court vacated the Commission's ninety percent and advertising rules, distinguishing its affirmance of the identical rules in *NATO* on the fact that the latter decision was in the "context of a need to allocate scarce spectrum resources." (App. A, p. 55.) We submit that the Commission's authority to regulate competing video services, with the goal of achieving an integrated nationwide network, provides the necessary jurisdiction for the Commission to require that such specialized services provide a beneficial supplement to what is already available. This being the case, the rules should be upheld since they beneficially increase the diversity available to the public by assuring that "subscription operations provid[e] a different and diverse type of programming from that found on advertiser supported television." (App. C, p. 188).

II. THIS COURT SHOULD RESOLVE A CONFLICT AMONG CIRCUITS CREATED BY THE DECISION BELOW CONCERNING THE STATUS UNDER THE FIRST AMENDMENT OF CABLE TELEVISION SYSTEMS WHICH USE BROADCAST SIGNALS

The court below held that the Commission has broader authority under the First Amendment over broadcast television than it does over cable television systems which use broadcast signals.[17] This conclusion is based upon the absence, in the case of cable television, of the broadcast factors of spectrum scarcity and physical interference.

The court's holding conflicts with decisions in various circuits. In those cases the courts have upheld against a First Amendment challenge, limitations imposed by the Commission on the right of cable television systems to cary such programming as they may choose and in so doing have rejected the argument that a different result is required because "CATV systems do not themselves use the airwaves in their distribution systems." *Black Hills Video Corporation* v. *FCC,* 399 F.2d 65, 69 (8th Cir. 1968). Instead, when cable systems "use radio signals and . . . have a unique impact upon, and relationship with, the tele-

[17] After appearing to equate television systems with newspapers for purposes of government intrusion into their First Amendment rights (App. A, p. 80), the court then immediately indicates that regulation of cable television can be valid if this Court's test in *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968), is satisfied. Although the court refers to other cases where *O'Brien* has been applied (App. A, p. 85 and n.92), none involve newspapers.

vision broadcast service," they have "the same constitutional status [as broadcast stations] under the First Amendment." *Id.*

Under this test, the pay cable rules invalidated below should have been upheld under the First Amendment. Regulation of broadcasting for the purposes of preserving popular entertainment programming for free television and encouraging the development of the pay medium as a supplemental service has been upheld. *NATO, supra;* see also App. A, pp. 108–112. Moreover, although the opinion below does not make this clear,[18] the cable systems to whom the pay cable rules apply are only those which use broadcast signals. Finally, the operation here being regulated, namely the video cablecasting of programs "indistinguishable from network programs when they arrive on the television receiving set in the home"[19] by cable systems whose channels are also being used to carry regular television programs is one which clearly has a "unique impact upon, and relationship with, the television broadcast

[18] Contrary to the Court's suggestion that the Commission has previously applied its rules "to cable systems that did not use broadcast signals," App. A, p. 78 and n. 80, the Commission's regulations have only been applied to systems using broadcast signals, even though the subject matter of particular regulations has not always been confined to broadcast signals. See, *e.g.*, *Midwest Video*, *supra*, 406 U.S. at 667–68 and 673 (program origination requirement); *ACLU* v. *FCC*, 523 F.2d 1344 (9th Cir. 1975) (access requirements).

[19] *National Association of Regulatory Utility Commissioners* v. *FCC*, 533 F.2d 601, 616 (D.C. Cir. 1976).

service." *Black Hills Video Corporation, supra,* 399 F.2d at 69.[20]

Other courts of appeals have either expressly adopted the holding in *Black Hills* concerning the First Amendment or reached a similar conclusion upholding retraints on programming which can be carried over cable systems.[21] In addition to a conflict with these cases, the opinion below also places in doubt the Commission's right to pursue policies previously upheld, but in cases where a First Amendment challenge was either not reached or not raised. See, *e.g., Midwest Video, supra* (program origination); *ACLU* v. *FCC, supra,* (access requirements).

The court below, referring paticularly to the *Black Hills* case and an earlier case in its own circuit, *Buckeye Cablevision, Inc.* v. *FCC,* 387 F.2d 220 (1967), acknowledged the possibility of a conflict be-

[20] The court below was skeptical at best about a relationship between cablecasting and signal retransmission. App. A., pp. 78–79 and n.80. However, a majority on this Court has recognized the "interdependencies between [broadcast transmission] and cablecasts." *Midwest Video, Supra*, 406 U.S. at 662–63 and n.21 (plurality opinion); and at 675 (concurring opinion of Chief Justice Burger in which he pointed out that "CATV is dependent totally on broadcast signals.") See also a letter to the editor of the Washington Star, Jan. 22, 1976 at p. 14, from the President of the National Cable Television Association, in which he said that "[p]ay cable TV, for which cable TV subscribers pay an extra monthly fee is only one service offered as a part of the total CATV package."

[21] See, *e.g., Conley Electronics Corp.* v. *FCC*, 394 F.2d 620, 624 (10th Cir.), *cert. denied*, 383 U.S. 858 (1968); *Tituaville Cable TV, Inc.* v. *United States*, 404 F.2d 1187, 1190 (3rd Cir. 1968), *Great Falls Community TV Cable Co.* v. *FCC*, 416 F.2d 238, 240–42 (9th Cir. 1969).

tween its resolution of the First Amendment issue and that reached in these earlier cases. It indicated that those opinions had perhaps failed to consider the significance of distinguishing for constitutional purposes between regulation where microwave broadcast facilities were involved and the direct regulation of cable television systems which did not use microwave broadcast facilities (App. A, pp. 78–79 and n. 80).

However, the court in *Conley Electronics Corporation, supra*, was specifically asked to distinguish that case from earlier cases where First Amendment challenges had been unsuccessful, on the ground that they were concerned with licensing microwave carriers and not with direct regulation of cable systems. The Court held that "the cases are indistinguishable. In both situations what is involved is reasonable regulation in the public interest." 394 F. 2d at 624 (citation omitted).[22]

Apart from other court cases, the opinion below casts a constitutional doubt on at least two different statutes in which Congress has evidenced an intent not to distinguish between broadcast stations and cable television systems subject to Commission jurisdiction.

[22] A distinction based upon whether microwave facilities are being used has also not been of decisional significance in other contexts. *Southwestern Cable Co., Supra* (Commission jurisdiction over non-microwave CATV systems upheld); *CBS, Inc.* v. *Teleprompter Corp.*, 476 F. 2d 338, 348–49 (2d Cir. 1973) (copyright liability for carriage of local signals does not turn upon whether microwave links are used in the carriage), *affirmed in part and reversed in part on other grounds*, 415 U.S. 394 (1974).

In both instances the particular legislation has clear First Amendment overtones. Thus, cable television systems, like broadcasters, are subject to the equal time requirement in the Communications Act. 47 U.S.C. § 315(c). Similarly, the statute which prohibits cigarette advertising is applicable not only to broadcasters, who unsuccessfully challenged its constitutionality before this Court,[23] but to "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission." 15 U.S.C. § 1335.

III. THE COURT HAS APPLIED THE STANDARD OF REVIEW OF AGENCY ACTION IN INFORMAL RULEMAKING IN A MANNER THAT CONFLICTS WITH DECISIONS OF THIS COURT AND VARIOUS COURTS OF APPEALS AND SEVERELY LIMITS THE ABILITY OF THE COMMISSION TO MEET FUTURE PROBLEMS BEFORE THEY OCCUR

While giving lip service to the proper standard of review of agency action in informal rulemaking, the court has applied the arbitrary and capricious standard contained in 5 U.S.C. § 706(2)(A) in a manner which conflicts with decisions of this Court and various courts of appeals, including the court below. These decisions, unlike the opinion below, have manifested a willingness to permit regulatory agencies to "plan

[23] *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971), judgment affirmed, 405 U.S. 1000 (1972).

in advance of forseeable events"[24] and to act on the basis of their own forecasts and expert judgments even when the record does not contain concrete supporting evidence of the benefits to be advanced or the harm to be avoided. This latitude for agencies attempting to regulate for the future has been specifically approved in cases involving this Commission, as well as other agencies.

With respect to the Commission, its responsibility is "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service." 47 U.S.C. § 151. This Court has recognized that this obligation requires the Commission to do more than simply monitor communications activities with a view toward taking affirmative action only when actual injury to the public interest is observed, or when it can prove with certainty the consequences of inaction. Thus, when the Commission came before this Court, in *Southwestern Cable, supra,* in defense of its authority to regulate cable television "as a *supplement* rather than a substitute for off-the-air television service,"[25] it acknowledged that "it could not

[24] *Southwestern Cable, supra,* 392 U.S. at 177. See also Verkuil, *Judical Review of Informal Rulemaking,* 60 Va. L. Rev. 185 (1974), for an analysis of "the District of Columbia Circuit Court's attempt to develop new standards of review for informal rulemaking." *Id.* at 208.

[25] *First Report and Order in Docket 14895,* 38 FCC 683, 701 (1965) (emphasis supplied). See also 38 FCC at 699 and the *Second Report and Order in Docket 14895, supra,* 2 FCC 2d at 735. The court below, in faulting the Commission for not justifying the position that cable television should be a supplemental service, (App. A. p. 60), disregards the long history of the Commission's policy on this matter and instead erroneously embarks on its own inquiry "into the wisdom of the regulations that the Commission promulgates." *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742, 749 (1972).

predict with certainty the consequences of unregulated CATV." 392 U.S. at 176–177. Nevertheless, this Court concluded that the imprtance of the Commission's efforts to regulate cable for the purpose of developing and maintaining an effective off-the-air system "can scarcely be exaggerated, for broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation's population," and it affirmed the Commission's judgment that, notwithstanding the uncertainties, "its statutory responsibilities demand that it 'plan in advance of foreseeable events, instead of waiting to react to them.'" *Id.* at 177 (citation omitted.)[26]

Shortly after *Southwestern,* the Commission again found it appropriate to act to preserve the general public's right to continue to receive informational and popular entertainment programming via the conventional advertiser-supported off-the-air television service. This time, the subject of the regulations was the pay broadcasting service. Again the Commission received judicial approval of its efforts to regulate for the future. *NATO, supra,* 420 F. 2d at 206–208.

[26] Although this Court in *Southwestern* did not specifically pass upon the validity of the Commission's regulations, *Id.* at 167, their validity was "subsequently and correctly upheld by courts of appeals." *Midwest Video, supra,* 406 U.S. at 659 and n. 17 (citation omitted).

The court in *NATO* found the regulations "to protect free television" and "to prevent the more popular kinds of free programs from migrating to subscription television" were "reasonable and amply supported by the record." 420 F.2d at 206.

A similar "rational connection between the facts found and the choice made," *Burlington Truck Lines, Inc.* v. *United States,* 371 U.S. 156, 168 (1962), should have been made in the present case under a proper application of the standard of review. The court sought to distinguish the case below from *NATO* on the ground that the subscription television rules upheld in *NATO* were "based on elaborate data generated in a two-year trial of subscription broadcast television in Hartford, Connecticut." (App. A. p. 101). However, to the extent that the data and conclusions developed in the Hartford experiment (for example, data concerning the viewing preferences of subscription patrons) established the foundation for rules to protect the free television service against incursion by a pay service, the support provided is just as applicable to pay cablecasting as it was to pay broadcast-

[27] *See* 23 FCC 2d at 828, where the Commission said, "where cablecasting is accompanied by a per-program or per-channel fee, it is akin to subscription television and presents the same threat of siphoning"; (App. C, p. 168–69), "the rationale behind the anti-siphoning rules applies equally to both forms of subscription service," and "we see no justifiable distinction between over-the-air and cable operations which would warrant unequal treatment under our rules"; and (App. C, p. 170), "both pay cable and STV present siphoning potential."

ing.[27] Moreover, it is clear from the Commission's *Fourth Report and Order on Subscription Television, supra,* which was before the Court in *NATO,* that the Commission, notwithstanding some data from the Hartford experiment, was still forced to base its regulations there on its best judgment as to future events, even though it recognized it was dealing with "imponderables." *Id.* at 507–08.[28]

Here, even though the Commission again was confronted with a situation where relevant factors did not lend themselves to precise forecasts,[29] it nevertheless had more evidence available to it than it had when it adopted the first subscription rules before *NATO.* Its experience since 1968 substantiated "the basic conclusion upon which the program restrictions were premised—that subscription programming will consist largely of feature films, series and sports events, all of which are mainstays of conventional television programming" (App. C, p. 171). Moreover, this time instead of dealing with an unborn industry as in *NATO,* the Commission was dealing with an industry which was growing by leaps and bounds. From 16,000 subscribers in March 1973, the pay cable industry had

[28] The *NATO* court suffered from no illusions concerning the nature of the record in that case, since it noted that the Commission's concern was with the "possibility" of siphoning and the "potential impact of [subscription television] on poor people and free television." 420 F.2d at 197, 207.

[29] *See* e.g., *CBS Television Network Affiliates Association* v. *FCC,* --- F.2d --- (D.C. Cir. 1977) where the court said, in another cable context that "predicting the rate of future cable growth would be exceptionally difficult." Slip op. No. 75–1491 of March 31, 1977 at p. 13 and n. 15 (citation omitted).

increased its audience to over 100,000 by September 1974, (App. C, p. 133), and by the time this case was argued in court in April 1976 the number had jumped to 400,000. The use of satellite facilities held the promise of increasing even that growth rate.[30]

Cases in contexts other than the Commission's regulation of cable television and pay broadcasting have also upheld Commission actions in advance of foreseeable events even where the consequences of both action and inaction are admittedly uncertain. In short, these cases establish that the Commission in its policy-making role "does not have to wait for evidence that can only be supplied by the future." *National Association of Independent Television Producers and Distributors* v. *FCC*, 516 F. 2d 526, 541 (2d Cir. 1975).[31]

[30] *See Teleprompter Corp.* v. *CBS*, 415 U.S. 394, 405 (1974) where this Court referred to the likelihood that an interconnection arrangement among cable systems could allow cable systems "to compete more effectively with the broadcasters for the television market."

[31] *See, e.g., FCC* v. *RCA Communications, Inc.*, 346 U.S. 86, 96–97 (1953); *Mt. Mansfield Television, Inc.* v. *FCC*, 442 F.2d 470, 483–84 (2d Cir. 1971); *Washington Utilities and Transportation Commission* v. *FCC*, 513 F. 2d 1142, 1160 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). Nor is this a principle peculiar to just this Commission. *See, e.g., United States* v. *Detroit and Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945), holding that "uncertainties as to the future" need not "paralyze the [Interstate Commerce Commission] into inaction"; *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1, 29 (1961), where this court rejected arguments that the FPC should have adduced testimonial and documentary evidence to the effect that its forecast would come true stating, "we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency"; *American Airlines* v. *Civil Aeronautics Board*, 192 F. 2d 417, 421 (D.C. Cir. 1951) (quoting from CAB's opinion), where the court approved a Civil Aeronautics Board decision to "take into account and give appropriate weight to broad considerations of future welfare," and to follow an approach "necessarily predicated upon future estimates as well as present facts for it is keyed to future goals and an effort to envisage the shape of things to come"; and *Amoco Oil Co.* v. *EPA*, 501 F. 2d 722, 741 (D.C. Cir. 1974), where the court stated that, "[w]here... the regulations turn on choices of policy, on an assessment of risks, or on predictions dealing with matters on the frontiers of scientific knowledge, we will demand adequate reasons and explanations but not findings of the sort familiar from the world of adjudication."

However, the court below followed a different course. It appears to demand that the proponents of the regulations "prov[e] their case" (App. A. p. 64) before the Commission can act.[32] The imposition of such a prerequsite would paralyze federal agencies. The question before the court is not whether proponents before the agency have "proved" the need for regulations, but whether the "challenger of agency regulations [has] demonstrate[d] that they are arbitrary and capricious." *American Nursing Home Association* v. *Cost of Living Council*, 497 F.2d 909, 914 (TECA 1974). *See* also *Angel* v. *Butz*, 487 F.2d 260, 263 (10th Cir. 1973), *cert. denied*, 417 U.S. 967 (1974).

[32] Several parties had submitted mathematical demonstrations attempting to show the point at which pay cable could outbid the networks for specific programs. The court dismisses the relevancy of those showings, stating that they were invalid since they attempted to compare the present-day programming "expenditures" of the networks with the forecast per-program "income" of the pay cable industry in 1980. (App. A, p. 63–65). Such comparisons might not be the best evidence to aid an agency

The effect of the application of the standard of review below, if left unchecked by this Court, will be to permit a court, in the guise of following the arbitrary and capricious standard of review, to "substitute its judgment for that of the agency," contrary to the teaching of this Court.[33] *Citizens to Preserve Overton*

to make determinations in concrete situations where exact comparable figures are available, but in situations where the agency is trying to gauge "potential" impact they cannot be said to be irrelevant. Moreover, the court's suggestion that the Commission should have analyzed whether conventional television could dig deeper into its pockets to outbid the cablecasters does not rebut the probability of impact, and would only thrust the Commission in a never ending circle of speculation trying to determine at what point the impact would become unmanageable.

[33] The court has misread the Commission's order when it describes that order as having found that "anticompetitive effects could be tolerated because cable use of broadcast signals constituted 'unfair competition' and *consequently* regulation was needed 'to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential." (App. A, p. 71, emphasis added.) The Commission unmistakably listed two reasons and separated them by numbering them (1) and (2). The unfair competition rationale, rejected by the court, was number (1)—there was no "consequently" in the Commission order—and number (2) was "to ameliorate the risk . . . [of] a future adverse impact on television broadcast service." See 2 FCC 2d at 736 (App. C, p. 167). This second rationale, not considered by the court, was the rationale most directly applicable to subscription cablecasting. To ignore it is to ignore the whole purpose of the antisiphoning rules, which is to insure that the public's necessary reliance on conventional television shall not be impaired by siphoning of programming to subscription services which cannot be made available to all of the people. (App. C, p. 167). The Commission's determination that the "public interest in maintaining the conventional television structure has outweighed the interest in unregulated competition," *Ibid.*, "re-

Park v. *Volpe,* 401 U.S. 402, 416 (1971). The pitfalls associated with this judicial substitution of judgment are amply illustrated by this case. Thus, for example, in expressing its disagreement with the Commission's judgment that siphoning would lead to a loss of popular programs for audiences not served by cable systems, the court expressed its belief that it would be to the "economic advantage of cable operators to sell broadcast rights to conventional television stations in regions of the country where no cable service existed." (App. A, p. 66, and 54). What the court failed to consider was that conventional television stations which serve non-cable regions do not serve *only* these regions. When any part, however small, of the audience within the reach of a broadcast station's signal has access to cable service, then the court's assumption about cable operators' willingness to share broadcast rights fails. The fact is that the great majority of people who live in non-cable areas receive their television service from broadcasters whose television markets encompass some cable. As petitioners below have conceded, "it is doubtful" that even a majority of pay cable subscribers would pay to watch a program on cable if the same program was simultaneously available on a broadcast station "without the

flects the kind of judgment that is entrusted to it, a power to weight the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.'" *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974) (citing *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 535–536 (1946)). See also *United States* v. *Drum*, 368 U.S. 370, 374–375 (1962).

necessity of making a direct payment." *Initial Comments of Time Incorporated, Home Box Office, Inc. and Manhattan Cable Television, Inc. in Docket No. 19554,* at 65 (filed Sept. 20, 1974).[34]

IV. THE COURT'S BLANKET PROHIBITION OF *EX PARTE* CONTACTS IN INFORMAL RULEMAKING IS CONTRARY TO LAW

The Commission's action was also challenged below by an *amicus,* Mr. Henry Geller, on the ground that the agency had received *ex parte* communications during the course of the pay cable proceeding which had affected the final form of the adopted rules. Mr. Geller contended that such communications were impermissible under the doctrine of *Sangamon Valley Television Corp.* v. *United States,* 269 F.2d 221 (1959) because in his view the instant case, like *Sangamon* involved "conflicting private claims to a valuable privilege."

The court below agreed with Mr. Geller that *Sangamon* was applicable to this case and that the Com-

[34] Similarly, the court below erred when it expressed its belief that the restrictions against advertising during pay programs, far from serving, as the Commission believed, as a means of encouraging the pay medium to offer innovative programming, actually kept pay cable from being available to poor people. If there were advertising, the court believed that rates could come down and the poor might then be able to subscribe. (App. A, p. 67). What the court overlooked was that people do not obtain pay service for an additional charge unless they subscribe to the regular cable service whereby there is first a payment to get hooked up, followed by a monthly fee of $4 to $6 before the possibility of an additional fee for pay cable even comes up. It was not unreasonable for the Commission to act on the assumption that this kind of arrangement is likely to be financially unattractive, generally speaking, to poor people.

mission's *ex parte* contacts were therefore improper (App. A, p. 93). The court also asserted, however, that pursuant to the "mandate" of *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), the "public record" must reflect all relevant information presented to an agency during the course of its proceedings (App. A, 98–99). It therefore did not limit its ultimate holding to cases involving "conflicting private claims to a valuable privilege." Instead, it barred *ex parte* contacts in all informal rulemakings, stating (at *id.,* pp. 105–106) that:

> Once a notice of proposed rulemaking has been issued . . . any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should "refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision . . ." [citation omitted]. If *ex parte* contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon [citation omitted].

In a special concurring opinion, Circuit Judge MacKinnon averred that, while the court's treatment of the *ex parte* matter was appropriate to this case, its holding was "overly broad" (App. B, p. 119). In Judge MacKinnon's view, *ex parte* contacts should be restricted in informal rulemaking only where such

proceedings involved either "competing private claims to a valuable privilege," as in *Sangamon,* or "selective treatment of competing business interests of great monetary value," as in the instant case (*Id.,* p. 122). Judge MacKinnon also questioned the court's reliance on *Overton Park, supra,* noting that in the instant case, "there is no statutory requirement for specific findings nor are the regulations limited to the full administrative record" (*Id.,* p. 119).

Thus, the opinion of the court below, in striking down the procedures followed in this informal rulemaking proceeding with respect to *ex parte* communications, promulgates entirely different ground rules from those which have been consistently followed by the Federal Communications Commission and other agencies in attempting to discharge their quasi-legislative functions. Indeed, the opinion in this case, if left to stand, would all but eliminate the "dichotomy"[35] between informal rulemaking, on the one hand, and adjudication and formal rulemaking, on the other, which, as this court has recognized in *American Trucking Associations* v. *United States,* 344 U.S. 298 (1953); *United States* v. *Allegheny-Ludlum Steel Corp.,* 406 U.S. 742 (1972); and *United States* v. *Florida East Coast Railway Co.,* 410 U.S. 224 (1973), is the touchstone of modern administrative law. Accordingly, certiorari should be granted.

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[35] *American Airlines, Inc.* v. *CAB,* 359 F. 2d 624 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 343 (1966).

A. OVERTON PARK AND THE SUNSHINE ACT ARE INAPPLICABLE TO THE INSTANT PROCEEDING

In reaching its conclusion that there should be a total ban on *ex parte* contacts in rulemaking, the court below ignores a long line of cases which hold that, when an agency is engaged in rulemaking, it is not bound by the materials formally submitted to it, but may look beyond them in order to draw upon its expertise. *Pacific Coast European Conference* v. *United States,* 350 F.2d 197, 205 (9th Cir. 1965) *cert. denied,* 382 U.S. 958 (1965); *California Citizens Band Association* v. *United States,* 375 F.2d 43, 54 (9th Cir. 1967); *General Telephone Co. of the Southwest* v. *FCC,* 449 F.2d 846, 862 (5th Cir. 1971); *Angel* v. *Butz,* 487 F.2d 260, 262–263 (10th Cir. 1973), *cert. denied,* 417 U.S. 967 (1974); *Flying Tiger Line, Inc.* v. *Boyd,* 244 F. Supp. 889, 892 (D.D.C. 1965); *cf. SEC.* v. *Chenery Corp.,* 332 U.S. 194, 208 (1947); *NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 348–49 (1953); *United States* v. *Florida East Coast Railway Co., supra,* 410 U.S. at 235; *City of Chicago* v. *FPC,* 458 F.2d 731, 746 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 1074 (1972); *Chrysler Corp.* v. *Department of Transportation,* 472 F.2d 659, 668–669 (6th Cir. 1972); *Moss* v. *FPC,* 502 F.2d 461, 465 (D.C. Cir. 1974), *cert. denied,* 422 U.S. 1020 (1975). Moreover, the court all but concedes that there is no basis for its holding in the Administrative Procedure

Act, which, as the Attorney General stated in 1947, "clear[ly] does not require the formulation of rules upon the exclusive basis of any 'record' made in informal rule making proceedings." *U.S. Department of Justice, Attorney General's Manual on the Administrative Procedure Act 31.* Accordingly, the court relies almost exclusively on *Overton Park, supra,* asserting that "whatever the law may have been in the past [footnote omitted], there can now be no doubt" that it is obligated to test rules promulgated by the Commission against the "full administrative record" that was before the agency at the time it made its decision (App. A, pp. 97–98).

However, this Court specifically noted in *Overton Park* that it was not dealing there with rulemaking, 401 U.S. at 414, but with informal action pursuant to a specific statutory mandate. *Id.* at 405. Accordingly, since rulemaking is involved here, and there is no specific statutory mandate, *Overton Park* "has no application." *Angel* v. *Butz, supra,* 487 F.2d at 263. Therefore, the Commission "need not . . . compile a record of the material upon which its rule is based" and "may act on the basis of data contained in its own files or on its own views or opinions." *Chrysler, supra,* 472 F.2d at 669. See also *American Trucking Associations, Inc., supra.* Moreover, "a reviewing court cannot test the rule as promulgated against the evidence in the agency's record." *Chrysler, supra; Flying Tiger Line, supra.*

The court's reliance on *Overton Park* in connection with *ex parte* matters is also inconsistent with one of its own precedents. In *D.C. Federation of Civic Associations* v. *Volpe,* 459 F.2d 1231, 1247 (1972), *cert. denied,* 405 U.S. 1030 (1972), the court stated that if the administrative action there had been "purely legislative," it "might have agreed" that the decision could stand in spite of "extraneous pressures." In the instant case there is no doubt whatever that the Commission's action was "purely legislative." Therefore, according to the court's own reasoning in *D.C. Federation,* that action should be upheld. See also *Angel* v. *Butz, supra; cf. Fletcher* v. *Peck,* 10 U.S. (6 Cranch) 87 (1810); *United States* v. *O'Brien,* 391 U.S. 367 (1968).

The opinion below also cites *Overton Park, supra,* for the proposition that where an agency "justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly" (App. A, p. 99). But *Overton Park* explicitly reaffirmed the long held principle that an agency's action "is entitled to a presumption of regularity." 401 U.S. at 415, citing *Pacific States Box and Basket Co.* v. *White,* 296 U.S. 176, 185 (1935); *United States* v. *Chemical Foundation,* 272 U.S. 1, 14–15 (1926). Moreover, the problem in *Overton Park* was that the administrator had failed to justify his action at all. 401 U.S. at 407–08, 420;

compare *United States* v. *Morgan,* 313 U.S. 409, 414 (1941). This was made clear in *Camp* v. *Pitts,* 411 U.S. 138, 143 (1973), where this Court stated that "[u]nlike *Overton Park* . . . there was contemporaneous explanation of the agency decision. The explanation may have been curt, but it surely indicated the determinative reason for the final action taken[.]" In the instant case, there was also a contemporaneous explanation of the agency decision, and it was not curt, but exhaustive. Accordingly, the Commission's action must stand or fall on that explanation; the court has no right to go behind it absent a strong showing of "bad faith or improper behavior," neither of which is evident here. *Overton Park, supra,* 401 U.S. at 420.[36]

In any event, *Overton Park* addresses only the question of what must be available to the courts on review; it says nothing about making data available to the parties for comment during the course of a proceeding.[37] According to the court below, however, such disclosure is essential because of the importance of "adversarial discussion" to agency decisionmaking and judicial review. But to require that there be

[36] It is also significant that although the Court in *Camp* recognized that bank charter proceedings are largely conducted *ex parte*, it did not hold that this caused any procedural infirmity. 411 U.S. at 141; see also *Bank of Commerce of Laredo* v. *City National Bank of Laredo*, 484 F.2d 284, 287, (5th Cir. 1973), *cert. denied*, 416 U.S. 905 (1974), and cases cited therein.

[37] In this connection, it is significant that no party to this proceeding has accused the Commission of attempting to base its pay cable rules on anything as to which there was not a fair opportunity for comment.

complete disclosure and "adversarial discussion" of everything said and done in rulemaking proceedings is to forget that:

> [R]ule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest,

and that:

> [S]uch rule making is not to be shackled in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

American Airlines v. *CAB, supra,* 359 F.2d at 629. Indeed, to require such disclosure and discussion is, in effect, to require a hearing on the record, in contravention of the Administrative Procedure Act and the holdings of this Court in *American Trucking Associations, supra; Florida East Coast, supra;* and *Allegheny-Ludlum, supra.*

The court below further contends that its opinion here is consistent with the objectives of the Government in the Sunshine Act, Pub. L. No. 94–409, 90 Stat. 1241 (1976). However, a proposal to prohibit *ex parte* contacts in informal as well as formal rulemaking was included in an early version of that act,[38]

[38] S. 260, 93rd Congress, 2d Sess. (1974). See House and Senate Committees on Government Operations, 94th Cong., 2d Sess., Government in the Sunshine—S. 5 (Public Law 94–409) Source Book: Legislative History, Texts and Other Documents 88 (1976).

but was ultimately removed by the Congress.[39] Congress also failed to pass proposed legislation calling for the logging and disclosure of *ex parte* contacts.[40] Thus, not only is the court's opinion not consistent with the Sunshine Act, it is directly contrary to the intent of Congress in enacting that legislation.

In this connection, it is noteworthy that *amicus* Geller, in testimony before a Senate subcommittee, applauded as "wise" the deletion of the provision in S. 260 calling for a general ban on *ex parte* contacts in rulemaking.[41] It was Mr. Geller's contention that existing case law, including *Sangamon,* was sufficient to cover those rulemaking situations where *ex parte* contacts would be inappropriate.[42]

It is also noteworthy that, contrary to the court's contention at n. 128 of its opinion, the Bar of the City of New York opposed the "extension of the *ex parte* prohibition of the Sunshine Act to informal rulemaking."[43] So too did the Administrative Conference of the United States;[44] thus, the court erred in asserting

[39] Source Book, *supra* at 230 (Senate report), 530, 568 (House reports) 811 (conference report).

[40] S. 1239, 94th Congress, 1st Sess. (1975).

[41] Government in the Sunshine: Hearings on S. 260 before a Subcommittee of the Senate Committee on Government Operations, 93rd Congress, 1st Sess. 219, 222 (1974) (hereafter "Senate hearings").

[42] As noted *infra*, however, Mr. Geller has only recently come to the conclusion that proceedings like that involving pay TV should be governed by *Sangamon.*

[43] Government in the Sunshine: Hearings on H.R. 10315 and H.R. 9368 before a Subcommittee of the House Committee on Government Operations, 94th Congress, 1st Sess. 256 (1975).

[44] Senate hearings, *supra* at 248–49, 260.

(at n. 130) that compliance with its opinion would be in compliance with that body's recommendations.

Thus, whether or not *ex parte* communications in informal rulemaking are desirable as a matter of policy, they are clearly permissible as a matter of law, and the court's far reaching holding to the contrary warrants the attention of this Court.

B. THE SANGAMON CASE DOES NOT GOVERN THE INSTANT PROCEEDING

The court below has also extended its earlier holding in *Sangamon, supra,* to the entirely different factual setting of informal policy making proceedings. This action warrants this Court's attention because, as construed by the court below, *Sangamon* would lead on a broad scale to an obliteration of the distinction between rulemaking and adjudication.[45]

Certainly this case and *Sangamon* bear little, if any resemblance to each other; the latter involved a handful of would-be broadcasters contesting the assignment of a single VHF television channel, while the former involves a panoply of broadcast, cable, motion picture, sports, cultural and other interests contesting

[45] *Amicus* Geller appears to believe that the situations in which *Sangamon* would apply would be relatively few in number. The Commission is of the view, however, that if the doctrine of *Sangamon* were applied to the instant case, there would be few, if any, rulemakings to which it would not also apply. In the Commission's opinion, rulemakings almost invariably attract participants who will be affected in some manner by their outcome, and who in some sense stand to gain or lose a "valuable privilege" in the sense that the term is used by *amicus* Geller.

the future of several industries. Moreover, most of those who have analyzed *Sangamon* have stressed its unique characteristics. In the words of one leading commentator:

> The peculiar facts situation and combination of interests and expectancies of parties involved in [The *Sangamon*] rulemaking proceeding . . . converted it into an adversary proceeding to which the judicial ethic was applicable. *Peck, Regulation and Control of Ex-Parte Communications with Administrative Agencies, 76 HARV. L.REV. 233, 241 (1962).*

Indeed, even *amicus* Geller has confessed that, during his tenure as a senior FCC official, he too "failed to recognize the applicability of *Sangamon*" to cases like the one at bar [46]—a confession of some relevance, since it was Mr. Geller who, in 1959, wrote the original *Sangamon* brief for the Department of Justice and coined the phrase "conflicting private claims to a valuable privilege" which was later adopted by the court. Furthermore, Mr. Geller has acknowledged the Commission's "good faith purpose" in declining to follow *Sangamon* in proceedings involving general issues—the "need for communication between the Commission and the industry . . . concerning problems of mutual interest." [47]

Nevertheless, in asserting the applicability of *Sangamon* here, the court below insists that it "would

[46] See page 6 of Mr. Geller's "Petition for Revision of Procedures or for Issuance of Notice of Inquiry or Proposed Rule Making," filed with the Commission December 12, 1974.

[47] *Id.* at 5, quoting *Rules Governing Ex Parte Communications*, 1 FCC 2d 49, 57 (1965).

have thought that the principles announced there so clearly governed the instant proceeding that there could be no question of the impropriety of *ex parte* contacts here" (App. A, pp. 102–103). In reaching the opposite conclusion, however, the Commission relied, and continues to rely herein, on two other cases from the District of Columbia Circuit, *Courtaulds (Alabama) Inc.* v. *Dixon,* 294 F. 2d 899 (1961) and *Van Curler Broadcasting Corp.* v. *United States,* 236 F. 2d 727 (1956), *cert. denied,* 352 U.S. 935 (1956). In *Courtaulds,* it was stipulated that, prior to the issuance of certain final rules, the FTC had sought, received and considered *ex parte* information relating to the merits of the proceeding from various parties, including competing manufacturers. *Courtaulds, supra* at 902, n. 10. Despite this, the court there refused to invalidate the regulations since it found "no evidence that the Commission did anything improper or gave to any interested party advantages not shared by all." *Id.* at 904–905. The *Courtaulds* court distinguished *Sangamon* on several grounds, one being that "the [*Courtaulds*] proceeding clearly was one of rule making, both in form and substance, and hence was not subject to all the restrictions of a quasi-judicial hearing." *Id.*

The court below attempts to explain away *Courtaulds* on the ground that the Commission here did act in secret (App. A, p. 103, n.124). But all interested parties to this proceeding were informed that they had equal opportunity to present whatever information they wished, without being confined to official

comments."[48] Also, footnote 16 of *Courtaulds* does not erroneously suggest, as the court below would have it, that *Sangamon* "did not involve rulemaking." It does suggest, however, that the holding of *Sangamon* should be limited to "quasi-judicial" proceedings.

In refusing to find any impropriety in the FTC's considerations of *ex parte* communications, the *Courtaulds* court (also at n.16 of its opinion) referred to the earlier case of *Van Curler, supra.* In *Van Curler,* the court held that there was "nothing improper or erroneous" in the Commission's receipt of *ex parte* material "in regard to the nation-wide intermixture problem, concerning which the Commission was seeking all sorts of advice and information preparatory to setting up a general nation-wide rule-making proceeding." 236 F.2d at 730. Since pay television is also a "nation-wide" issue, the Commission believes that *Van Curler* affords a much closer parallel to the instant case than does *Sangamon.*[49]

It should also be noted that, in 1975, *amicus* Geller raised the issue of the reach of *Sangamon* before the Second Circuit Court of Appeals in connection with the Prime Time Access Rule. That case also involved a dispute, nationwide in scope, among many industries, as to what the Commission's policy should be

[48] See, in this respect, Section C, *infra.*

[49] In pleadings before the court below, *amicus* Geller sought to distinguish *Van Curler* on the ground that the *ex parte* contacts there took place before the general rulemaking had actually started. However, the reference to *Van Curler* in *Courtaulds* suggests that conversation of the type approved in *Van Curler* need not be confined to the prenotice period.

with respect to the marketing pattern for prime time television programs. The Second Circuit, however, did not hold that *ex parte* contacts had invalidated the Commission's procedures, nor did it grant Mr. Geller's request for a remand. Instead, its opinion did not even mention the argument based on *Sangamon. National Association of Independent Television Producers and Distributors* v. *FCC,* 516 F.2d 526 (1975).[50]

C. THE COMMISSION DID NOT VIOLATE ITS OWN RULES IN PERMITTING THE EX PARTE CONTACTS HEREIN

The court below also asserts (although no such claim was made by *amicus* Geller or any other party) that when the Commission permitted *ex parte* contacts in this proceeding, it violated its own Rule 1.415, which provides that written comments and replies may be

[50] In reversing the Commission, the court below also relies on Executive Order 11920, 41 Fed. Reg. 23665 (1976), which it characterizes as analogous to *Sangamon* (App. A, p. 104). However, the fact sheet issued by the White House in connection with this order reveals a *sui generis* situation which cannot be compared either to *Sangamon* or the instant case. Specifically, it appears that under Section 801 of the Federal Aviation Act, and pursuant to his constitutional responsibility for foreign policy and national defense, the President has authority to approve or disapprove certain decisions of the Civil Aeronautics Board. Nevertheless, the CAB is supposed to decide these cases in the first instance through its regular channels and according to all ordinary (*i.e.*, other than *raison d'etat*) criteria. (It is significant that all of the relevant CAB actions involve hearings rather than notice and comment procedures.) Executive Order 11920 was issued to prevent people from taking advantage of Section 801 to bypass the CAB and go straight to the President on matters which should have been left to the agency. This rationale has no application to the instant case; accordingly, the court's citation is inapposite.

submitted and that "no additional comments may be filed unless specifically requested or authorized." 47 C.F.R. 1.415; see App. A, pp. 100–101, n.122. A similar result was reached in *Sangamon, supra,* and shortly thereafter the Commission publicly and explicitly declared that its notice and comment procedures were "not intended to preclude the informal submission of other information and arguments." *Rules of Practice and Procedure,* 24 Fed. Reg. 6057 (1959).[51] More recently, in a document entitled *The Public and Broadcasting—A Procedure Manual,* 39 Fed. Reg. 32288, 32295 (Rev. ed. 1974), the Commission reiterated that it might "tap other sources of information" besides written comments in making the policy judgments involved in rulemaking, and the agency added that "unless otherwise stated in the notice, staff members working on the proceeding are generally prepared to meet with and discuss the proposed rule with anyone who is sufficiently interested." It is fundamental that an agency's interpretations of its own rules are "of controlling weight unless plainly erroneous." *Udall* v. *Tallman,* 380 U.S. 1, 16–17 (1965); *Bowles* v. *Seminole Rock Co.,* 325 U.S. 410, 414 (1945).

Moreover, since Sangamon, the Commission has, on a case-by-case basis, "specifically authorized" *ex parte* contacts in some informal rulemaking proceedings and specifically prohibited them in others. *Rule Making Procedures,* 30 Fed. Reg. 9277, 5 Rad. Reg. (P&F) 2d 1701 (1965); see also *Rules Governing Ex Parte Communications, supra,* 1 FCC 2d at 51 (1965). In accordance with this practice, the *Notice of Proposed Rule Making in Docket No. 19954* expressly stated that "[i]n reaching a decision in this matter, the Commission may take into account any other relevant information before it, in addition to the comments invited by this *Notice.*" 35 FCC 2d 893, 899 (1972). Contrary to the court's contention, there is just nothing "cryptic" about this sentence.[52] The Commission clearly said that it might consider *ex parte* material in deciding the pay cable issue, and this was understood, not only by the various private interests involved, but also by the numerous public interest representatives that did communicate with the Commission on an *ex parte* basis during the course of this porceeding.[53] Thus, the Commission has not violated its own rules, nor has it acted in a manner inconsistent with the "spirit of the Freedom of Information Act,"[54] as the court also avers.[55]

[51] The Commission had argued this same point in its brief in *Sangamon,* but to no avail.

[52] Admittedly, though, the Commission's meaning may be somewhat obscured in the truncated version of the quotation given in n. 122 of the opinion below (App. A, p. 101).

[53] The Commission listed contacts with several such entities in its submission to the court of appeals. It is not true, as the opinion below maintains, that the agency "reported [no] *ex parte* contacts from public interest intervenors other than *amicus* Geller." App. A, p. 101, n. 122.

[54] 5 U.S.C. 552(a)(2)(B).

[55] App. A, p. 101, n. 122. Furthermore, the Commission has indisputably complied with the letter of the FOIA as well, since its policy on *ex parte* contacts has been published on several occasions in the Federal Register. *Rules of Practice and Procedure, supra; Rule Making Procedures, supra; The Public and Broadcasting, supra.*

CONCLUSION

It is respectfully submitted that the petition for certiorari should be granted.

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